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RIEFS

No. 15-214

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

WISCONSIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, THE REAL ESTATE ROUNDTABLE, NATIONAL ASSOCIATION OF REALTORS, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL APARTMENT ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL AND LEADING BUILDERS OF AMERICA IN SUPPORT OF PETITIONERS

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IDENTITY OF *AMICI*[1]

Amici are the largest and most influential real estate industry organizations in the United States, specifically:

National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders and/or remodelers, and its builder members construct about 80 percent of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

Real Estate Roundtable ("Roundtable") represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the seventeen major national real estate industry trade associations, to jointly address key national policy issues related to real estate and the overall economy. Collectively, Roundtable members hold portfolios containing over 12 billion square feet of office, retail, and industrial

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1. No counsel for a party authored this brief in whole or in part and no person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

properties valued at more than $1 trillion, over 1.5 million apartment units, and in excess of 2.5 million hotel rooms.

Building Owners and Managers Association International ("BOMA") is a federation of ninety-one U.S. associations and eighteen international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types, including 10.4 billion square feet of U.S. office space that supports 1.8 million jobs and contributes $227.6 billion to U.S. GDP. Its mission is to advance the interests of the commercial real estate industry through advocacy, influence and knowledge.

International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. The shopping center industry is essential to economic development and opportunity. It is a significant job creator, driver of GDP, and critical revenue source for the communities its members serve through the generation of sales taxes and the payment of property taxes. These taxes fund important municipal services, including firefighters, police officers, school services, and infrastructure such as roadways and parks. Shopping centers are not only fiscal engines; they are integral to the social fabric of their communities by providing a central place to congregate with friends and family, discuss community matters, and participate in and encourage philanthropic endeavors.

National Apartment Association ("NAA") is a federation of nearly 170 state and local affiliates that

encompasses over 69,000 members representing more than 8.1 million apartment homes throughout the United States and Canada. NAA is America's leading voice for the apartment housing industry, providing members with the most comprehensive range of strategic, educational, operational, networking, and advocacy resources they need to learn, to lead and to succeed.

National Association of Real Estate Investment Trusts ("NAREIT®") is the worldwide representative voice for REITs and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

National Association of REALTORS® ("NAR") is a nationwide, nonprofit professional association that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. NAR's membership includes 54 state and territorial Associations of REALTORS®, approximately 1,300 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

National Multifamily Housing Council ("NMHC") is a national nonprofit association based in Washington,

D.C., that represents the leadership of the $1.3 trillion apartment industry. Its members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 38 million Americans who live in apartments today. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and eighteen million U.S. households live in an apartment home (buildings with five or more units).

Leading Builders of America ("LBA") is a national trade association representing twenty one of the nation's largest public and private homebuilders. LBA members build approximately one-third of all new homes sold in the United States each year. LBA seeks to preserve home affordability for American families by engaging issues that affect home affordability, availability of credit, or home construction practices.

INTRODUCTION AND INTEREST OF *AMICI*

Amici are national and international real estate industry organizations whose members consist, collectively, of hundreds of thousands of firms and individuals that own, develop, manage or finance countless parcels of real property in jurisdictions across the United States. Many of those firms and individuals have substantial real estate holdings. They therefore often own or engage in transactions involving contiguous, but distinct, real estate parcels.

Amici's members regularly purchase, sell, develop, finance and otherwise deal with real property. When they engage in those transactions, these property owners and managers have a very clear understanding – from the law of real property – of the parcel, or the distinct multiple parcels, that are the subject of their purchase, sale or other transactions. Property law is clear in every jurisdiction that the lot lines that separate real property create discrete parcels.

Amici and their members have a strong interest in assuring that clear rules providing for separate treatment of distinct real property parcels also apply to the relevant parcel analysis in regulatory takings cases like this one. Indeed, given their reliance in their everyday business on state law lot lines delineating real property parcels, it is unsettling to *Amici*'s members that courts in regulatory takings cases are not at all clear about the boundaries of the real property that is relevant in such cases. Instead, courts in takings cases sometimes – like the court below in this case – treat multiple contiguous parcels of real property as if the state law lot lines separating the parcels did not exist. Courts do so even though those very same multiple contiguous parcels can still be bought, sold, and financed separately.

Aggregation of multiple contiguous parcels without regard to state law property boundaries invariably leads to negative outcomes for land owners, because the larger the scope of property to be considered, the less severe the impact of an offending regulation on the entire relevant parcel. Aggregation of distinct parcels therefore may make it virtually impossible to establish an "elimination of all economic use" taking under *Lucas v.*

South Carolina Coastal Council, 505 U.S. 1003 (1992), and even more difficult than usual to establish a taking under the alternative multi-factor analysis of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Thus, in addition to being inconsistent with bedrock real property principles and practices delineating the boundaries of separate parcels in other contexts, aggregation of distinct but contiguous parcels in takings cases is also fundamentally unfair – and discriminatory – to parties like *Amici*'s members who frequently purchase, own and develop contiguous distinct parcels.

Amici therefore urge the Court to reject the *per se* aggregation rule applied by the court below. Instead, we respectfully urge the Court to adopt a relevant parcel rule that declares – or at least strongly presumes – that the metes and bounds that define each separate parcel of real estate in other contexts define the relevant parcel in Fifth Amendment takings cases as well.

SUMMARY OF ARGUMENT

The *per se* rule applied by the court below – which aggregated distinct property parcels in a takings analysis – poses particular problems for *Amici*'s members, who typically have (or finance) large landholdings and regularly engage in real estate transactions involving multiple, often contiguous, parcels. The aggregation in regulatory takings cases of separate lots – which are legally–distinct for every other purpose – is inconsistent with the legal principles and practices delineating separate real estate parcels that *Amici's* members rely on when they purchase, sell and otherwise transact with respect to real property. It also is fundamentally unfair, and discriminatory, to

parties that own and develop multiple contiguous parcels. Under the *per se* aggregation rule, contiguous parcels that are separately owned are treated one way, but if commonly owned they are treated another way. In a regulatory takings case that difference is usually important, and sometimes decisive.

There is no reason in principle or in this Court's precedent, let alone in the property law or business practices that govern real property transactions, to pretend in this one context only that the metes and bounds defining each separate parcel of real estate do not exist. This Court should reject the *per se* aggregation rule applied by the court below and adopt the relevant parcel rule proposed by Petitioners, which respects state law property boundaries by presuming that they govern in regulatory takings cases no less than in the purchase, sale or financing of real property parcels.

ARGUMENT

In this regulatory takings case, the court below applied what amounts to a *per se* rule that separate property parcels which are contiguous and under common ownership – here, lot "E" and lot "F" – must be considered together as the relevant property in assessing the takings claim. *See* Pet. Br. at 8-10. On behalf of their members, *Amici* real estate industry organizations strongly support Petitioners' positions that:

1) the Court should reject that *per se* rule, and

2) the Court can and should clarify regulatory takings law by explaining that the relevant parcel determination is

ordinarily governed by familiar and well-established real estate law principles and practices, and thus real estate parcels that are distinct under applicable state or local law must also be deemed, or at least strongly presumed, to be separate parcels for purposes of assessing a regulatory takings claim.

I. The *Per Se* Rule Applied by the Court Below Is Contrary to the Legal Rules and Practices Delineating Separate Lots That Property Owners – Like *Amici*'s Members – Rely on Every Day in Conducting Their Businesses.

The ruling below requiring aggregation of contiguous parcels in regulatory takings cases is contrary to bedrock principles of real property law that delineate separate property parcels and treat them as separate units. *Amici*'s members understand those real property law principles and rely on them regularly when buying, selling, developing or financing real property. There is no reason to impose on these real estate industry participants – or any property owner – a contrary and counter-intuitive rule aggregating distinct but contiguous property parcels if and when they should challenge confiscatory government regulation as a taking.

A leading property law treatise states the "general rule" – "the boundary line between adjacent properties is to be determined by reference to the deeds and the intention of the parties as reflected by the description in the deeds." 4 TIFFANY REAL PROPERTY § 997 (3d ed. 2015). Moreover, "where there is no ambiguity in the descriptions they are to be taken as conclusive evidence of the intention of the parties." *Id.* In other words, clearly stated property

descriptions in deeds establish "the boundary line between adjacent properties." *Id.* All property owners routinely rely on that general rule when they buy, sell, or finance the real property parcels described in the respective deeds pertaining to those parcels.

Certainly ambiguities and disputes over property descriptions in deeds can arise, and real property also can be carved up into individual "strands" – like life estates and fractional interests. But this case involves, and *Amici* address, only individual parcels of land owned in fee simple – like the Murrs' Lots "E" and "F" – which commentators and some courts have termed "horizontal divisions of land." *See, e.g.*, John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1537 (1994). This brief uses the terms "property parcel" or "real estate parcel" as shorthand for these horizontal, fee simple interests. These parcels are the stock-in-trade of *Amici*'s members' real estate businesses.

Under recordation statutes in force in every state, when a deed is recorded, the conveyance of the parcel described in the deed – and "the boundary line between [it and] adjacent properties," *see* 4 TIFFANY REAL PROPERTY § 997 – is generally conclusive (absent fraud and the like) against those claiming a conflicting interest. *See* 5 TIFFANY REAL PROPERTY § 1262 (3d ed. 2015) ("Courts are . . . adverse to altering the substance and effect of instruments of conveyance which have been duly recorded."). *Amici*'s members rely on those state law recordation systems as well when they buy and sell real property parcels. Banks and other lenders likewise rely on the parcel descriptions and boundaries in recorded deeds, and in mortgages, to properly secure their interests. Since the

advent of state recordation laws in the early 19th Century, this Court has repeatedly recognized their validity and importance in settling disputes concerning ownership of distinct property parcels. *See, e.g., Jackson ex dem. Hart v. Lamphire*, 28 U.S. 280, 290 (1830) ("Reasons of sound policy have led to the general adoption of [such] laws . . ., and their validity cannot be questioned.").

Similarly, as far back as 1855, this Court held that property boundaries honestly determined by a public surveyor under an act of Congress should be conclusive and binding on the parties and are not to be disputed or disregarded by the courts:

> This construction of the law is altogether necessary, as great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no ground other than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do.

Haydel v. Dufresne, 58 U.S. 23, 30 (1855); *see also Russell v. Maxwell Land-Grant Co.*, 158 U.S. 253, 256 (1895) ("A survey made by the proper officers of the United States, and confirmed by the land department, is not open to challenge by any collateral attack in the courts.").

The *per se* aggregation rule applied by the court below is contrary to these venerable and foundational principles of real property law. These principles continue today to define the property parcels that are the subject

of countless real estate transactions conducted by *Amici*'s members and other property owners. Those property owners are familiar with and rely on these basic principles in conducting their business affairs, and they should not have a contrary rule thrust upon them in regulatory takings cases – at least in the absence of some very compelling reason. In most cases, there will be no reason for aggregating distinct parcels; to the contrary, and as shown below, aggregation of contiguous parcels introduces fundamental unfairness and market inefficiencies into the world of real estate commerce.

II. Aggregation of Contiguous, Commonly-Owned Real Property Parcels Is Fundamentally Unfair to Real Estate Industry Participants, Who Frequently Own Adjoining Properties.

The *per se* aggregation rule applied by the court below results in arbitrary and unequal treatment of similarly situated owners. It is axiomatic that parties have equal rights under the Constitution and under the Takings Clause in particular. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) ("A regulation or common-law rule cannot be a background principle [restricting the right to just compensation] for some owners but not for others."). Yet, under the aggregation of contiguous parcels approach to the relevant parcel issue, parties owning functionally and physically identical parcels of property will have dramatically unequal rights depending only on their holdings.

That is exactly the situation in this case, by the express terms of the county ordinance that causes the taking. That ordinance provides that a lot considered "substandard," as

is lot "E" here, may nevertheless be "allowed as [a] building site[]," but only if the lot "is in separate ownership from abutting lands." *See* Pet. Br. at 6-7 (quoting subsection (4) (a) 1. of the Ordinance in question); *Murr v. St. Croix Cty. Bd. of Adjustment*, 796 N.W.2d 837, 842 (Wis. Ct. App. 2011) (same). Thus, if lot "E" were owned by anyone other than the Murrs, that owner could use the lot as a building site despite its substandard status. However, because lot "E" and abutting lot "F" are both owned by the Murrs, they are foreclosed by the ordinance from building on lot "E." Under the *per se* aggregation-of-parcels rule applied below, the Murrs are also likely foreclosed (because of the larger relevant parcel) from succeeding on a *Lucas*-based claim for the ordinance's destruction of the value of lot "E" in the Murrs' hands. *Cf. Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 425 (2011) (noting testimony of agency official that a permit denied to a developer that owned other nearby property would have been granted had the applicant been a party other than that developer), *rev'd on other grounds*, 707 F.3d 1286 (Fed. Cir. 2012).

Because *Amici*'s members frequently buy, own and develop contiguous real property parcels, under the *per se* aggregation rule, that same kind of starkly discriminatory treatment would threaten *Amici*'s members in countless situations that arise in the ordinary course of their real estate-oriented businesses. Developers and others in the real estate business frequently acquire or own multiple adjacent parcels for good and valid business reasons, and should not be penalized for those business practices if the government regulates away the value of one or more separate parcels. The owner of a single, isolated developable lot of land undoubtedly has a claim for a constitutional violation if the lot is subject to restrictions

preventing all economically beneficial use of the property. That is the holding in *Lucas*. *See* 505 U.S. at 1019. And yet, if that owner happens to own one or more contiguous unregulated lots, the constitutional right disappears. Thus, the government escapes liability for restrictions that are considered oppressive simply because an owner is more prosperous – or happens to be in a real estate-oriented business in which he regularly acquires multiple, sometimes contiguous parcels. The Court should not countenance that kind of unequal treatment of otherwise identically situated property owners. *See Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 (Fed. Cir. 1994) ("[T]he Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.").

Not every case in which courts have aggregated contiguous real estate parcels for takings purposes involves a regulatory imposition like the one here that discriminates expressly against owners of abutting parcels. But the same kind of discriminatory treatment is implicit in other cases. For example, in *District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), the property owner (District Intown) was foreclosed from building on lots 2 through 9 when the city declared those parcels part of a historic landmark together with lot 1, which already contained an apartment building. The court rejected the owner's claim that the city had thereby effected a regulatory taking of lots 2 through 9, holding that for takings purposes, those parcels must be considered together with lot 1, which retained significant value that the court found to defeat the alleged taking. *See id.* at 880-82. Because the landmark designation eliminated all economic use of lots 2 through 9, the takings

claim would likely have succeeded if those lots were owned by anyone but District Intown.[2]

A property owner in District Intown's circumstance might consider selling lots 2 through 9 to an unrelated developer, but as discussed below, the availability of that option only compounds the adverse impact of the discriminatory treatment, by distorting the market for developable property. A buyer with knowledge of District Intown's predicament would surely offer a lower price, and most buyers would have requisite knowledge from readily available land records documenting the landmark designation. The situation was similar in *Multnomah Cty. v. Howell*, 496 P.2d 235 (1972), where the court held that a prohibitive zoning classification preventing beneficial use of four of nine separately platted lots was not a taking, because the ordinance "must be tested by its effect on the whole of defendant's contiguous property . . ." *See id.* at 238. Had the four distinct lots been all that the claimant owned, or had those lots been owned by a third party, the takings claim likely would have prevailed.

To allow categorical takings protection to wax or wane depending on whether one owns additional contiguous property is to sanction arbitrary government treatment, for there is no rational or fair connection between the extent of a property owner's holdings and the level of protection to which that owner is entitled. Such an

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2. In *District Intown*, the D.C. Circuit did not apply a rule as extreme as the one under review here, because in the court's view more than just common ownership united the nine parcels. 198 F.3d at 880. Still, had parcels 2 through 9 been owned by a third-party, the result would likely have been a taking of those parcels because the landmark designation precluded their beneficial use.

understanding converts federal takings law into an anti-deep pocket rule – and one that falls especially harshly on real estate industry participants like *Amici*'s members who often own multiple, contiguous parcels or must purchase such parcels to have a viable project. There is simply no basis in the law for that approach:

> We might as well say that all property owners who earn more than a certain income are not entitled to compensation under the Fifth Amendment so as to make it less expensive for government to regulate. Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part.

John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1032 (2003).

In short, even apart from the metes and bounds that define separate property parcels under otherwise applicable law, principles of equity, fairness and good policy are at war with the notion that contiguous parcels of real property should be artificially aggregated so as to defeat a constitutional right to compensation. As Professor Fee also wrote: "Why should the law declare that a landowner may not own more than one adjacent 'parcel' of land, each independently protected by the Fifth Amendment?" John E. Fee, *Of Parcels and Property in Taking Sides on Takings Issues: Public and Private Perspectives* § 5.4 (Thomas E. Roberts, ed. 2002), at 112.

There is no good reason. Conversely, treating legally distinct parcels of land as separately protected units accords both with constitutional justice, by affording property owners equal and fair treatment, and with basic principles of real property law delineating the separate lots that landowners – including *Amici*'s members – deal with regularly when they buy and sell, finance or develop real estate.

III. The *Per Se* Aggregation Rule Also Distorts, and Creates Inefficiencies, in Real Estate Markets.

Real estate owners, and those seeking to acquire real property, do not typically consider the effect of a transaction concerning one property parcel on other distinct parcels. That is no less true for real estate industry participants like *Amici*'s members who regularly buy and sell distinct real property parcels. When property owners engage in such a transaction, there is rarely a need for them to consider the legal consequences of that transaction for adjoining parcels – even if they already own those adjoining parcels, or are also seeking to acquire them. Real estate transactions proceed on a parcel-by-parcel basis, focused on the property parcel that is the subject of the transaction, as delineated in the deed for that parcel.

This is not to say that real property owners, including *Amici*'s members, are not aware of potential *practical* consequences of buying or developing one parcel on neighboring parcels. Common experience, as well as common sense, teach that placing a gas station in a residential community will lower property values, just as property values will increase if the developer places a

conservation easement on nearby parkland. But unless a property owner affirmatively creates a *legal* link between two parcels – for example, by creating an access easement across one parcel to benefit an adjacent parcel – there is nothing in real property law or the common experience of real estate industry participants to suggest that mere *ownership* of contiguous parcels can have *legal* consequences, let alone have adverse legal consequences to the common owner of the parcels.

The *per se* aggregation rule applied by the court below is a stark legal anomaly, and if adopted nationwide would have a significant practical – and negative – impact on real estate markets and transactions. Property owners would then have to consider the legal consequences of acquiring contiguous parcels. They also would understand that if they subdivide a large parcel into numerous lots and maintain ownership of those lots, the government could regulate away the value of one lot and avoid paying just compensation because the relevant parcel for takings purposes would be all the subdivided lots collectively. But if the same property owner sold each subdivided lot to a third party, the government's regulatory power would decrease because in that event, a regulation eliminating all economic use of one lot would work a *Lucas* taking.

"This is fundamentally inconsistent with the classical idea of property as a fungible entitlement." Fee, *The Takings Clause As a Comparative Right*, *supra*, at 1033-34. And it would unfairly penalize real estate market participants for investing in the most efficient manner. The *per se* aggregation rule undermines the efficient allocation of real property resources by discouraging a property owner from purchasing two separate but

contiguous developable lots, and encouraging piecemeal and inefficient transactions. The rule would reward the sophisticated developer who strategically buys properties sufficiently apart, while penalizing less savvy property owners who seek to minimize transaction and development costs by purchasing contiguous parcels. And, as shown by the District Intown example discussed previously, such a rule would distort market prices for real estate because buyers would know that owners of contiguous parcels have an added legal incentive to sell.

The law should not compel property owners to purchase property in geographic isolation just to preserve their constitutional protections against uncompensated takings. Yet, the *per se* aggregation rule would achieve exactly that result.

IV. The *Per Se* Aggregation Rule Is Inconsistent With This Court's Precedent.

There is no principle or precedent to commend a *per se* aggregation rule. Although the court below cited precedent in support of the *per se* rule it applied, *see* Pet. App. at A-9-10, citing *Zealy v. City of Waukesha*, 548 N.W.2d 528 (1996), which in turn relied on *Penn Central*, 438 U.S. at 130-31, both *Zealy* and *Penn Central* involved an entirely different factual situation. In those cases, unlike in this case, the takings claimant contended that the relevant property was something different and less than the state-law delineated property parcel. In each case, the something less was not a recognized unit of property under applicable state or local law. In *Zealy*, the claimant alleged a taking of an 8.2 acre portion of his 10.4 acre parcel. *See* 548 N.W.2d at 369-71. In *Penn Central*,

the alleged taking was of "air rights" above Grand Central Terminal. *See* 438 U.S. at 130-31.

Those cases, and others of similar ilk that this Court has considered, hold only that a takings claimant cannot "conceptually sever" a single recognized unit of property into distinct interests or portions that are not legally-recognized property interests. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (rejecting claim that building moratorium was a taking of a "temporal" interest). The key passage from *Penn Central* makes clear that the Court was simply rejecting an attempt to dis-aggregate a recognized property unit: "'Taking' jurisprudence does not divide a *single parcel* into *discrete segments* and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130 (emphasis added).

The Court in *Penn Central* did not address the issue presented in this case, which is whether distinct property parcels that are recognized under state law should be aggregated and considered as one in a regulatory takings case. Nonetheless, the ultimate holding in *Penn Central* on the parcel issue was that the relevant property for takings purposes was the entire parcel as defined by local law which was subjected to the regulatory imposition. *See id.* at 130-31 (takings inquiry focuses "on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the 'landmark site'").[3]

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3. As Petitioners point out, Pet. Br. at 17-18, the facts in *Penn Central* involved contiguous and other nearby property that Penn

The court below offered no reason in principle or policy why legally defined and separate property parcels should be considered together in assessing a regulatory takings claim. Nor have other courts. In only one decision addressing this issue have *Amici* found any rationale – other than citation to *Penn Central*'s "parcel as a whole" rubric – for requiring or presuming that distinct real property parcels should be considered together in assessing a regulatory takings claim. And the rationale provided in that one decision, *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451 (2006), is both unconvincing and wrong. The court in *Giovanella* cited "common sense" and "intuition" in support of its ruling aggregating distinct parcels. *See id.* at 458 ("Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property."); *id.* at 457 ("intuitive starting point . . . is to consider as one unit all contiguous property held by the same owner.").

The Massachusetts court's intuition is plainly incorrect as applied to the facts here: the Murrs have long treated lots "E" and "F" as separate parcels, and desire to continue treating them separately. They want to sell lot "E," and retain and upgrade their cabin on lot "F." *See* Pet. Br. at 4-5. The court's intuition is also contrary to the common practices of *Amici*'s members. Home builders and other real estate developers frequently develop one or more, but less than all, contiguous parcels, reserving other parcels for sale, or later development of the same

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Central also owned along with Grand Central Terminal. The *Lucas* footnote criticizing the New York Court of Appeals' aggregation of all those parcels in its decision in *Penn Central*, which Petitioners also cite, *id.* at 18-19, squarely supports reversal here as well as the relevant parcel rule advocated by Petitioners and *Amici*.

or a different kind (*i.e.*, commercial versus residential). Real estate owners in other contexts may lease separate contiguous parcels to different lessees, for different uses, or may finance one or more but less than all contiguous parcels. Examples like this abound in the real world of real estate commerce, and belie the Massachusetts court's assertion that "a person owns neighboring parcels of land in order to treat them as one unit of property." Instead, like the Murrs, owners of distinct but contiguous parcels very often treat them as the separate real estate parcels that they are.

V. A Strong Presumption That State Law Lot Lines Define the Relevant Takings Parcel Is Consistent With the Legal and Practical Understanding That *Amici* Have About the Boundaries That Define Real Property Parcels.

The *per se* aggregation rule is unsupported legally and problematic on several grounds practically. In contrast, a relevant parcel rule that rests on a strong presumption that state law property lines also define the relevant property in regulatory takings cases will promote legal consistency, equity among property owners and market efficiency. Petitioners have shown that such a relevant parcel rule is fully consistent with this Court's precedent, and the Court should now make that clear.

Although it is unnecessary in this case to explore the narrow circumstances that may overcome the presumption, most if not all of them will likely involve strategic behavior by landowners – or by governments – aimed at circumventing the presumptive rule. Where that occurs, the rule by definition allows the party seeking

to overcome the presumptive rule to demonstrate why it should not apply on those particular facts. But real estate industry participants like *Amici*'s members are not in the business to try to "game" government regulations or incur the risks inherent in circumventing established legal rules. They are in business to engage in *bona fide* real estate transactions that are driven overwhelmingly by market considerations, which in turn rest on the objective needs of local communities for residential and commercial development. Strategic behavior of the kind that governments have sometimes alleged in takings cases is most often imaginary, as the Federal Circuit recognized in *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015), *pet. for cert. filed*, 84 U.S.L.W. 3564 (U.S. March 22, 2016) (No. 15-1192):

> The government argues that the trial court's holding will allow speculators to purchase regulated property cheaply, apply for a development permit, and, if the permit is denied, succeed on a *Lucas* claim. We disagree. Lost Tree argues persuasively that "[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits."

Strategic behavior by property owners to evade a relevant parcel rule is likely non-existent, but surely rare enough that it provides no reason for any pause in establishing a presumption that state law property lines delineating individual parcels of real property also define the relevant property for purposes of assessing a regulatory takings claim. *Cf. Arkansas Game and Fish Comm'n*

v. United States, 133 S. Ct. 511, 521 (2012) ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. . . . We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. . . . The sky did not fall after [*United States v.*] *Causby* [328 U.S. 256 (1946)], and today's modest decision augurs no deluge of takings liability.").

CONCLUSION

The Court should reject the *per se* aggregation rule applied by the court below and adopt the relevant parcel rule that Petitioners (and *Amici*) advocate, which presumes that the lot lines that delineate separate real property parcels under applicable state or local law also define the boundaries of the relevant parcel in a regulatory takings case.

Respectfully submitted,

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